No. 17058 and No. 17059

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FOOD MACHINERY & CHEMICAL CORPORATION, a Corporation, operated as WESTVACO MINERAL PRODUCTS DIVISION,

and

J. R. SIMPLOT COMPANY, a Corporation,

Appellants,

vs.

W. S. MEADER and MAY MEADER, husband and wife,

Appellees.

Reply Brief of Appellees

Appeals from the United States District Court
for the District of Idaho, Eastern Division

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GATEWAY PRINTERS—POCATELLO

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Reply Brief of Appellees

OPENING STATEMENT

Appellees instituted separate actions in nuisance against the Appellant, Food Machinery and Chemical Corporation, and the Appellant, J. R .Simplot Company. Those actions were consolidated for trial and at trial resulted in a jury verdict in favor of Appellees in case No. 17058 against Food Machinery and Chemical Corporation. The verdict of the jury and the judgment entered thereon was $57,295.80. The jury verdict and the judgment entered in case No. 17059 against J. R. Simplot Company was in the amount

of $4,246.41. The Complaints of Appellees against each of the Appellants charged the operation by the Appellants of a nuisance as to the Appellees during a period from on or about January 1, 1953, to on or about July 1, 1956, in emitting dangerous and poisonous gases and particulates from manufacturing plants operated by each of them which were carried to and deposited upon real property of the Appellees where they conducted a commercial fish hatchery; and that by reason of such emissions damages in an amount in excess of the judgments were suffered by the Appellees. The trial commenced April 13, 1959, and was concluded April 23, 1959. The evidence is voluminous, at times conflicting, but fairly supports the jury verdicts and the judgments entered on them.

STATEMENT OF FACTS

Appellees are in general agreement with Appellants' statement of the case insofar as it relates to the pleadings, but Appellees are unable to agree with Appellants' statement relating to the evidence.

In these appeals, with the exception of certain errors claimed by Appellants as to admission of evidence and as to giving of instructions, there is but one real issue, and that has to do with the sufficiency of the evidence to justify the verdict. In giving the statement of facts, Appellants have repeatedly made statements as to their view of what the evidenc shows, but not what it actually shows.

The Appellees, commencing sometime in 1915, for a

long period of years thereafter, operated a fish hatchery near Pocatello, Idaho, raising trout for sale commercially and developing brood stock for the taking of trout eggs and the resale of the eggs to a market developed over the years. R. 437-440. Food Machinery and Chemical Corporation commenced operations of its phosphorous plant in the latter part of the year 1949 and J. R. Simplot Company commenced operation of its plant and the manufacture of phosphate fertilizer and acids sometime during the year of 1944.

Each of the plants emitted fluoride in gaseous and particulate form and have continued to do so in greater or lesser amounts from the inception of their operation. The years involved in the law suit were 1953 to July of 1956. It is admitted in the answers of each of the Appellants and in the answers to interrogatories of each of Appellants, that such emissions occurred.

Fluorine is one of the most reactive and toxic elements known to science and is harmful to all types and kinds of life, including trout and trout eggs. R. 211, 239-326, 899-900. The Defendants' operations in the years involved admittedly resulted in large quantities of fluorine and fluorides being emitted into the atmosphere and being carried to lands surrounding the manufacturing plants, specifically including the properties of the Meaders within a radius of one to two miles of both manufacturing plants where the fish hatchery was located. R. 216-219, 238-241, 242-250, 1000, 1009-1010, 1025-1027, 1033-1038, Ex. 1-9.

The emissions from the plants of the Defendants were

both in particulate and gaseous form and were such that the winds did carry these effluents from the plants of the Appellants to the properties of the Appellees. Ex. 1-9, Ex. 41, R. 1099-1107, R. 595-601, 621-624, 655-656, 795, 811-813, 842-845.

Pronounced losses of fish and difficulty with eggs existed during the years involved in this suit and these losses were unusual and not within the experience of the Appellees who had operated this hatchery for almost forty years. R. 548-549, 683-692. Losses of fish were particularly observed at times following runoff of waters from melting snow, during rains, during falling of leaves from trees, during raising and lowering of the level of water around the ponds from the higher level reaching vegetation surrounding the ponds, and during times of low-hanging fumes and smoke from the Appellants' plants. R. 458-469, 494, 502-504, 506, 576-577, 685-690. The condition and appearance of the trout and the results of the egg hatch were unusual and not in the experience of experienced trout men. Various individuals, experts in operation of trout hatcheries by reason of their long experience in operating trout hatcheries, knew of no disease or condition in the trout recognizable to them and to others in the industry. So far as those hatchery men could and did testify, the operation at the Meaders was a good sound operation. R. 327-384, 469-477, 551-558, 671-708, 709-726, 744-746, 780-784, 801-842.

The record amply shows that the effects of fluorides and fluorine on trout and trout eggs may be described as

both chronic and acute. In the acute affects the trout may be killed in a relatively short period or in a longer period, but in the chronic condition resulting from the fluorides, the trout may have many results which are not normal, such as stunted growth, crippling effects, lack of fertility in the eggs. R. 259-327, 1031, 1090-1095.

The concentrations of fluorides on the Meader property showed as high as 300 ppm. on vegetation and showed up to 4.7 ppm. in water. Ex. 1-9 and Ex. 18. Concentrations in these amounts definitely would have their effect on the trout and trout eggs, according to Dr. Gale, who is the Dean of Pharmacy at Idaho State College and a recognized authority on toxicology, and whose testimony has been above referred to and appears in the record at pages 259 to 327. At page 325 of the record Dr. Gale stated directly that in excess of 3 ppm. fluoride would have an adverse effect on mature trout, whereas less than 3 ppm. would cause an abnormal growth and an adverse effect on younger trout. R. 325-326.

The results observed by the Appellees and by the various experienced hatchery men were completely consistent with the explained effects of fluorides on trout and trout eggs. The source of the fluorine was shown. The amounts reaching Appellees property was established. And the amount required to cause the observed effects in the trout and eggs being in conflict, the jury was entitled to accept the testimony of Dr. Gale rather than that of other witnesses.

The losses of the Appellees were established by financial

records, testimony of numerous witnesses, and by memoranda and data maintained during the period of the most serious losses. Ex. 15, 23, 22, R. 671-708, 729-796. The records as to the fish which died as the result of the fluoride, as well as the eggs, lost for sale as a result of the florides, coupled with the values on the market of eggs and of such fish, amply establishes damages fully justifying the amount awarded by the jury.

ARGUMENT

I.

IT IS NOT THE FUNCTION OF THIS HONORABLE COURT TO SEARCH THE TRIAL RECORD FOR CONFLICTING CIRCUMSTANTIAL EVIDENCE AND TO REVERSE THE JUDGMENT ENTERED ON A JURY VERDICT ON A THEORY THAT THE PROOF GIVES EQUAL SUPPORT TO INCONSISTENT AND UNCERTAIN INFERENCES.

The Appellants have, regardless of any assertion to the contrary, viewed the record most favorably to themselves. This is not the proper procedure in analyzing a record for purposes of an appeal. The Trial Court so stated in ruling upon the Motion for Judgment Notwithstanding the Verdict. The Order of the Trial Court appears at pages 87 and 88 in Volume I of the Food Machinery & Chemical Corporation record and at pages 65 and 66 of Volume I of the record in J. R. Simplot Company. There, the Court said:

". . . Although the evidence gives support to reasonable inferences and conclusions inconsistent with the jury verdicts, the Court cannot reweigh the evidence and set aside the verdicts merely because such inconsistencies exist or because it may or may not agree with the jury. There was and is sufficient evidence from which the jury could have drawn its inferences and conclusions that it did in rendering its verdicts, and by reason thereof the jury's verdicts cannot be set aside."

The rule in the Federal Courts, and, in fact, the almost universal rule is as stated by the Supreme Court of the United States in *Sentilles v. Inter-Caribbean Shipping Corp.*, 4 L. Ed. 2d 142, decided in the October Term, 1959. The Court said:

"It is not the function of a Court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. . . . The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. . . . Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other re-

sults are more reasonable."

Tennant v. Peoria & Pekin Union R. Co., 321 U. S. 29, 35;

Rogers v. Missouri Pacific R. Co., 352 U. S. 500.

The Supreme Court also directly referred to the necessity of expert testimony. On this question, the Supreme Court of the United States said:

> "The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, evident so shortly after the accident, was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. Neither can it be impaired by the lack of medical unanimity as to the respective likelihood of the potential causes of the aggravation or by the fact that other potential causes of the aggravation existed and were not conclusively negated by the proofs. . . . The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. They were entitled to take all the circumstances, including the medical testimony into consideration. See *Sullivan v. Boston Elevated R. Co.*, 185 Mass. 602, 71 NE 90; *Miami Coal Co. v. Luce*, 76 Ind. App. 245, 131 NE 824. . . ."

In *Fegles Construction Co. v. McLaughlin Construction Co.*, CCA 9, 205 Fed. 637, this honorable Court said:

> "While the Plaintiff must show that the inferences favorable to him are more reasonable or probable than those against him, the circumstantial evidence in civil cases need not rise to that degree of certainty which will exclude every other reasonable conclusion. The rule itself is operative chiefly (52a) in the trial court and does not detract from the established principle that when a finding is attacked as being unsupported, the power of the Appellate court begins and ends with a determination as to whether, considering the whole record, there is substantial evidence which supports the trier of fact. Where two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

In the case just cited, this Court held directly that once facts are established, even though established by indirect or circumstantial evidence, it is the province of the trier of fact to deduce all inferences logically flowing from such proof. In the course of the opinion, this Court also cited *E. K. Wood Lumber Co. v. Anderson,* CCA 9, 81 Fed. 2d 161, in which this Court said:

> ". . . The favorite formula that a presumption may not be based on another presumption or an inference on another inference has often been used carelessly

and inaccurately with resultant confusion."

Appellants' Brief is devoted almost entirely to various assertions regarding fluorine and fluoride in the water at the Meader Hatchery being insufficient to cause fluorine damage to the trout and trout eggs. In reviewing the record as to this theory, the Appellants have chosen to cite and discuss those portions of the record most favorable to them and to disregard all of the facts and the circumstances of the entire case from which the jury could and did find against the position urged by Appellants. We do not believe it necessary to quote at length from the record, inasmuch as in our Statement of Facts, we have made reference to large portions of the record which fully support the facts upon which the Appellees rely. There can be no real argument from an examination of the record as to substantial evidence existing supporting the following:

1. Meaders' operation for a long number of years prior to the operation of the Appellants' plant was a profitable and sound operation.

2. The Appellants did in the years involved in the law suit emit large quantities of fluorine and fluoride into the atmosphere which settled in and about the lands surrounding the manufacturing plants and particularly upon the lands and waters at the Meader Hatchery; and that the Appellants knew fluorides and fluorine to be toxic and harmful to animal and plant life, but did not install controls until 1955.

3. The odor and the fumes were observed in and about

the Meader properties on many occasions and were traced to the plants of the Appellants.

4. Losses in the fish and trout eggs at the Appellees' hatchery were unusual, abnormal, and not within the experience of the Appellees and other qualified persons; no disease or other condition existed at the hatchery excepting the fluorine from Appellant's plants which would cause the losses.

5. The fluorine and the fluorides emitted from the plants of the Appellants reached the properties of the Appellees in amount sufficient to cause and did cause acute and chronic fluorosis as to the trout of the Appellees and the trout when analyzed showed larger fluorine content than trout from outside the area of contamination.

The reports of Defendants, Exhibits 1 to 9, abundantly show the existence of fluorine and fluorides around the Meader properties, with samples of vegetation showing up to 300 ppm. Water samples showed up to 4.7 ppm. in the running water. The water samples were not taken at times when the fumes, gases, and particulate matters were heaviest around the Meader properties. The atmospheric phenomena of inversion frequently existed around Meaders and at such times fumes, gases and odors were most noticeable. Inversion most usually existed in the early morning or late evening hours. No samples were taken at these times.

Dr. Gale, a recognized toxicologist, positively stated that at 3 ppm. of fluorine any cellular life is in a danger zone. R. 266-267:

"A. The body has a defense mechanism to protect itself against some excess quantities, and 2 parts per million, it appears that the body could handle that, it appears from all evidence. As soon as you get around that area, your kidneys and the cells can't seem to rid themselves of that excess of fluorine.

Q. So that when you are over 3 parts per million, you are in a danger zone?

A. Yes, sir."

Then, at Page 267 of the Record, Dr. Gale testified, as follows:

"Q. Is there any difference, to your knowledge, between the effect of fluoride on animal life on the surface and living and breathing in the atmosphere as against fish life which is living in water and taking oxygen from water?

A. Basically, no. Because the food ingestion and the air breathed—

Q. They are going to have a similar effect?

A. Yes."

At Page 270 of the record, Dr. Gale testified:

"Q. Well, what I mean, the amounts that would totally block the enzyme system. You testified any-

thing over 3 parts per million would have its effect.

A. Well, we have chronic toxicity studies on humans. At certain levels we have situations of the problem developing where we have respiratory complications from fluorine, but many of these go unrecognized until it's a chronic situation after breathing lots and lots of it. Years ago we didn't recognize how potent fluorine was, and many chemists were exposed to some of the gaseous fluorines. About the only thing available to them when we have a case of fluorine poisoning is complete bed rest for four to six months, I believe.

Q. That is humans?

A. Yes, a chronic situation.

Q. Would you just tell us what the fact is, Doctor?

A. If you have a concentration of fluorine available to the cell, to cells—millions of cells—available to block them, then the body is not going to function to its normal capacity.

Q. Would it be immediately lethal?

A. You could have all gradations of total inactivity. It would not be immediately lethal."

Appellants, as to the tests which showed up to 4.7 ppm.

of fluorides in the ponds and springs at the Meader Hatchery, say that those tests are suspect and, therefore, should not be considered at all. Nevertheless, the tests were taken by them and there is a great deal of evidence of much larger concentration of fluorine in vegetation. It is the position of Appellees that the jury was entitled to consider the water testing and the vegetation testing in relation to all of the other circumstances and that such evidence was substantial and did justify the finding of the jury that the fluorine emissions from the Defendant plants did cause the damage to Appellees in loss of trout and trout eggs and did constitute a nuisance. It is the further position that the record positively shows the adverse effect which fluorine and fluorides in the amounts shown in water and plant life on the Meader property will have ~~on trout and trout plant life on the Meader property will have~~ on trout and trout eggs; that the Meader Trout, upon analysis (Ex. 18) were found to have had in the viscera, as opposed to the bone, 14 to 77 ppm fluorine, far exceeding the 2 ppm fluorine found in trout at Crystal Springs Hatchery, which is a hatchery outside the industrial pollution area. This is of importance because Dr. Gale many times said over 3 ppm. reaching cells would cause the results observed in Meader's fish.

Dr. Gale did testify that fish would be affected in water with a content of from .2 ppm. to 1 ppm. of fluoride. R. 287. That a small amount of fluorine in the bone is normal, R. 287, but if fluorine is in the tissues and viscera he would be worried about it. At page 308 of the record, Dr. Gale said:

"A. I think I shall refer to a statement I made yesterday; once an organism absorbs fluorine, if it is a mature organism with well formed bones, it will be able to detoxify and its kidney will be able to excrete and adequately protect it up to 3 parts per million, but in a range from 4.5 to 20 parts per million, as much as 30 to 60 per cent of the material will be retained in the organism.

A. . . . In the young fish, without bones, then the excess fluorine causes excess bone development and calcification of ligaments, and of cartilage. If you don't have the bone structure as a decalcifying mechanism, then you have got a problem—young immature adults have the same situation—I mean immature humans."

At page 315-316 of the Record, Dr. Gale said:

"A. The older trout has, if he has not already built up a high concentration from living in the environment in the area, if he has not filled his toxicity storehouse, so to speak, from living in the environment that Mr. Davis indicated yesterday, he will be able to detoxify more fluorine than a young fish, over a period of time.

Q. And he would not be damaged as a result?

A. He would be affected as a result, yes, sir.

Q. Well, now, damaged?

A. Well, you place me in a position again to stating whether a heart or a brain is more important to the function of the organism. The trout would not have his metabolism—his metabolism would be effected, it would be different than Mother Nature created him to be.

Q. And it could not, without going into the skeletal structure, detoxify that amount of fluorine without injury?

A. No sir, he could only handle about 3 ppm. and any excess—anything retained will cause chemical combinations with enzymes and will inhibit some of them."

Appellants have attempted to emphasize the testimony of Drs. Wohler and Wood. As we view the matter, this amounts to nothing more than an attempt to weigh the evidence and to arrive at a conclusion which is contrary to the conclusion reached by the jury. The question is not what the Appellants believe the evidence shows, but is whether or not the jury from the evidence could reasonably determine the matter as the jury did determine it. Dr. Wohlers said he was a chemist. He is not a toxicologist, nor is he a fish pathologist. Dr. Wohlers did not examine the Meader trout and make any informed conclusion from expert examination of the cells and tissue of the Meader trout. Actually, Dr. Wohlers

was nothing more than a coordinator of the investigation made for Stanford Research Institute as to the fluorine problem surrounding the plant of Food Machinery Corporation. This study was made in behalf of Food Machinery and for the study Stanford Research Institute was paid. Dr. Wohlers simply testified that in his opinion fluorine reaching Meaders was not sufficient to cause the claimed damage. Opposed to such conclusion of Dr. Wohlers is the positive testimony of the fluoride content of the water and the vegetation sampling showing up to 300 ppm. in the immediate vicinity of the Meader ponds. Dr. Gale, as has been demonstrated, testified that over 3 ppm. of fluorides reaching cellular life would cause damage to life, including trout, and would effect the fertility.

Dr. Wood attempted to testify in behalf of the Appellants. Dr. Wood never saw the trout at the Meader Hatchery during the years involved. He first saw the hatchery and any trout or eggs from it in March of 1959. R.1079. This was three years later than the latest date for which damages were claimed. He never performed any autopsy at all on the trout and simply attempted to give his opinion based upon some of the facts in the record. As a matter of fact, Dr. Wood wasn't even present throughout the trial. R. 1063-1064. Dr. Wood's opinion was not required to be accepted by the jury. In any event, Dr. Wood's testimony was apparently rejected by the jury and the testimony of Dr. Gale, together with all of the intendments and inferences derived from the circumstances accepted by the jury in concluding that Appellants had damaged the Appellees.

II.

INFERENCES MADE FROM PROBATIVE FACTS DO NOT CONSTITUTE LEGAL SPECULATIONS, IF THE INFERENCES ARE PROBABILITIES BY TEST OF COMMON JUDGMENT, AND SPECULATION IS NOT INVOLVED MERELY BECAUSE A CHOICE OF INFERENCES IS POSSIBLE FROM THE PROBATIVE FACTS.

In *National Lead Co. v. Shuft*, CCA8, 176 Fed. 2d 610, the Court said that inferences made from probative facts do not constitute legal speculations, if inferences are probabilities by test of common judgment. Furthermore, the Court there said that speculation is not involved merely because a choice of inferences is possible from the probative facts. That case also stands for the rule that a theory of proximate cause resting in probative circumstances does not become a matter of speculation and conjecture by mere suggestion of other possible causes which are unsupported by any proved facts.

In *Doctor's Hospital, Inc. v. Badgley*, 156 Fed 2d 569, the Court said:

> " . . . Probable causes may be inferred from apparent effects, despite the possibility of error, that inheres in all human observation and all human inferences. What looks like a man's signature may be found to have been written by him, though no one saw him write it and though it may actually be, as he claims, a forgery. Nothing is ever certain and in civil actions nothing

has to be proved beyond a reasonable doubt."

Many cases have held that probable causes may be inferred from apparent effects, despite the possibility of error that inheres in all human observations and all human inferences.

In *Newberry v. Crandell,* CCA 9, 171 Fed. 2d 281, the Court was concerned with the question of whether or not causation might be proved by circumstantial evidence. In that case the Court determined that the doctrine of res ipsa loquitur could be applicable to prove causation and that necessarily reliance must be placed upon circumstantial evidence. Again, in *Bratt v. Western Air Lines,* CCA 10, 155 Fed 2d 850, the Court in an airplane accident case where no direct proof was available, determined that circumstantial evidence, whether or not from an expert, could be used in determining the ultimate fact of causation.

In *Wardrop v. City of Manhattan Beach,* Calif., 326 P. 2d,15, the Court was concerned with the causal connection between the pumping onto Plaintiff's land of sump water and a polio virus with which a child became infected. The Defendant contended that the child could have contacted the virus from many sources other than the sump water, but the Court held that the jury could reasonably conclude the source of infection was from sump water rather than from another source, and that the Plaintiffs were not required to establish positively that the child's infection came from the sump water, because such would be an impossibility.

In Appellants' Brief, pages 40 to 46, an attempt is made

to disregard the effect of Dr. Gale's testimony as to toxic effects of 3 ppm. fluorine on trout and trout eggs, as well as all of the evidence bearing on the emissions from the plants of Appellants being carried to the lands of the Appellees. This is done by simply saying that Dr. Gale did not testify that any damage resulted to the trout and eggs of the Meaders, and since Dr. Gale did not see the trout and the eggs, all his testimony as to the effects of fluorine is to be disregarded, even though all of the other circumstances of the case directly and reasonably point to the condition of the trout and the eggs being the result of the emissions from the factories of the Appellants. To do this, Appellants must, as they do throughout their Brief, view the evidence in a light more favorable to them and with indifference to evidence in the record contrary to the position asserted by them.

The cases cited by Appellants' in Section B of their Brief do not support the position taken by them. 20*Am. Jur., Evidence, Section* 1189, is cited under this point at page 23 of Appellants' Brief. However, the text states that circumstantial evidence need not exclude every other cause and may so contradict positive testimony as to warrant the jury in disregarding positive testimony. 32 CJS, *Evidence, Section* 1039, states that any well connected train of circumstances is as cogent of the existence of fact as any direct evidence and may outweigh opposing direct testimony. Appellants, in any event, assume testimony given by their witnesses was direct and positive, which the record shows it was not. Both Dr. Woods and Dr. Wohlers were giving their opinion based upon their own surmise and conjecture. Dr. Wohlers, by his own admission was

not an expert in toxicology. R. 1023. A similar criticism may be made as to the other authorities cited by Appellants. That is, those cases are not in any manner comparable to the facts of this case and any abstract statements contained in them, as applied to this case, are of no value.

The record in this case shows a positive source of fluorides emitted from the factories of the Appellants, shows the results caused by such fluorides as applied to the trout and trout eggs, and the trout and trout eggs of the Appellees were damaged in accordance with the very effects which Dr. Gale described as resulting from amounts lower than actually found on the premises of the Appellees.

In *Kyle vs. Swift & Co.* 4CCA, 229 F. 2d 887, a food poisoning case, where the trial court directed a verdict on the basis that the Plaintiff relying on circumstantial evidence must exclude every reasonable explanation but that of responsiblity of Defendant, the Circuit Court reversed the Trial Court, stating:

> "The rule stated by the learned Trial Judge is the rule to be applied by the jury in a criminal case based upon circumstantial evidence, where guilt must be established beyond a reasonable doubt. It is well settled that for such purpose the evidence must be viewed in the light most favorable to the Plaintiff and every inference favorable to Plaintiff which can reasonably be drawn therefrom must be drawn. As said in *Wilkerson v. McCarthy,* 336 US 53, 57, 69 S. Ct. 413, 415, 93 L. ED 497: 'It is the established rule that

> in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support the case of a litigant against whom a peremptory instruction has been given.' And it is not enough to justify direction of a verdict for Defendant that conflicting inferences can be drawn from the testimony, as it is the function of the jury and not the judge to say what inferences are to be drawn."

In *Spalter v. Four-Wheel Brake Service Co.*, Calif., 222 P. 2d 307, at page 310, the Court said:

> "It must not be forgotten that in civil cases the law does not require absolute demonstration but only reasonable probability to support the jury finding. . . . . in order to support an inference based on circumstantial evidence it is not incumbent upon the Plaintiff to exclude the possibility of every other reasonable inference from the proved facts. . . . "

The rule that the trier of the fact has the right to determine the reasonable inferences from proved fact, whether the facts proven be circumstantial or direct, is in no way altered simply because the ultimate issue of whether or not the trout had been poisoned by fluorine was subject to different views. Dr. Wood, who never saw the hatchery or the trout and eggs in the critical years involved, testified that in those years a fish pathologist did not exist who could determine by autopsy the actual cause of death or condition of the trout. Such an individual as a fish pathologist just did

not exist. R. 1090. But, the fact is that Exhibit 18 shows that the viscera in the Meader trout analyzed during the years covered by the law suit did contain 14 to 77 ppm. fluorine; and Dr. Gale testified positively that 3 ppm. reaching the cells would cause the damage as described by him. Thus, it is a fact established by the record that the Meader trout did in fact suffer from fluorosis, and direct positive testimony of this fact does exist contrary to any assertion made by Appellants.

III.

THE ULTIMATE WEIGHT TO BE GIVEN TESTIMONY OF EXPERTS IS A QUESTION TO BE DETERMINED BY THE JURY; AND THERE IS NO RULE OF LAW REQUIRING THE JURY TO SURRENDER THEIR JUDGMENT OR TO GIVE A CONTROLLING INFLUENCE TO THE OPINION OF SCIENTIFIC WITNESSES.

The Supreme Court of the United States has commented on the function of a Court in examining the determination of a jury; and, of course, this Honorable Court has had the occasion to examine its function as well as the function of the Trial Court in reviewing a determination by a jury in a broad number of cases, involving many factual situations. Each such case rests upon its own peculiar facts and the record as developed in the Trial Court. The function and review is in no manner changed merely because the cause being reviewed involves a medical or expert issue. *Sentilles*

v. Inter-Carribbean Shipping Corp., 4 L. Ed 2d states the applicable rule. Prior to the decision in Sentilles, the United States Supreme Court in *The Conqueror,* 166 U. S. 110, 41 L. Ed. 937, at page 947 of the Law Edition, said:

> "In short, as stated by a recent writer upon expert testimony, the ultimate weight to be given to the testimony of experts is a question to be determined by the jury; and there is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinion of scientific witnesses."

The Idaho Supreme Court has held directly that the weight and credibility of the evidence of an expert witness is to be judged solely by the jury and such weight and credence will be given to it by the jury as the jury thinks the expert's testimony is entitled to. If the expert's testimony runs counter to the convictions of the jury as to the truth of the matter, the jury in the exercise of its judgment may disregard the particular expert's testimony. *Carscallen vs. Coeur d'Alene and St. Joe Transportation Co.*, 15 Ida. 444, 98 P. 622.

In any event, the argument of the Appellants that Appellees had no expert testimony is not the fact. Dr. Gale positively testified as to the effects of fluorine and fluoride on trout and trout eggs. His testimony was positive that an amount of 3 ppm. fluorine would cause the precise results which were observed as to the trout and trout eggs of Appellees. This testimony was not couched in obscure, ambig-

uous language, such as "might" or "possibly". Frequently, Courts have dealt in semantics in reviewing expert testimony, but there would appear to be no such criticism to be made of Dr. Gale's testimony in this case. The testimony of Dr. Wood and of Dr. Wohlers, offered by the Appellants, is of no greater value whatever than the testimony of Dr. Gale. Simply because the Appellants prefer to believe the opinions of their witnesses over the opinions of others does not detract in the least from existence of substantial evidence from which the jury had every right to determine the issue of causation and of liability in favor of the Appellees.

Michalis v. Cleveland Tankers, Inc. — US —, 5 L. Ed 2d 20, 29 Law Weekly 4001, recently decided by the Supreme Court of the United States in an action involving a seaman who claimed a casual connection between trauma and aggravation of Berger's Disease resulting in various amputations, cited the *Sentilles* case, 361 U. S. 107, for the proposition that because there is a difference of opinion as to causal connection does not mean that a question for the jury is not presented. In that case, both the Trial Court and the Appellate Court had found the evidence did not present a jury question but the Supreme Court reversed and remanded for trial. As to whether the wrench which struck the Plaintiff was a reasonably suitable appliance, the Court stated, page — of the Law Edition report:

> ". . . We think both Courts erred. True, there was no direct evidenc of play in the jaw of the wrench, as in *Jacob vs. New York City,* 315 U. S. 752, 754,

> but direct evidence of a fact is not required. Circumstantial evidence is not only sufficient but may also be more certain, saitsfying and precise than direct evidence. *Rogers v. Missouri-Pacific Railroad Co.*, 352 U. S. 500, 508. . . ."

The Court then went on to say that the jury, on the record, with the inferences permissible from the testimony would have been fully justified in finding for the Plaintiff; and that it does not matter that from the evidence the jury may also with reason, on grounds of probability, attribute the result to other causes.

At pages 28 to 40 of Appellants' Brief, Appellants attempt to develop the point that the Appelles failed to carry the burden of establishing by the testimony of experts or other scientific proof that the fish and trout eggs were damaged by the fluorine from the factories of Appellants. Appellants argue that there is a total absence of proof of cause and effect and that, as a result, the judgment can be based only upon guess, conjecture, and surmise. Many cases are cited. Again, the comment earlier made in this Brief is fully applicable; that is, that each case necessarily must stand upon its own facts and abstract principles of law may in a given situation be fully applicable and in another factual situation have no value.

As an example, the Appellants throughout the litigation in this case have cited the *Splinter* case, 74 Ida. 1, 256 P. 2d 215. The Trial Court did not believe this Idaho case to be

applicable for the reason that before that case can be applicable it would require the Court to say that the source of fluorine and the amount of fluorine deposited on and about the Meader properties insofar as the effect of fluorine on trout and trout eggs are wholly speculation and conjecture. It would also require the Court to say that the evidence as to the symptoms of the Meader trout and eggs and their being consistent with and identical to the results caused by fluorine was of no importance and conjectural. Also, it would require that the Court give no effect to the existence of fluorine and fluorides in excess of an amount which Dr. Gale said would cause the results as found in the trout and trout eggs. Appellants are not entitled to have these facts forgotten and overlooked. They are not entitled to have the testimony of Dr. Gale rejected and the testimony they desire to believe accepted for purposes of reversal.

IV.

NO PREJUDICIAL ERROR WAS COMMITTED BY THE COURT IN ADMISSIONS OF EVIDENCE OR IN RULINGS ON EVIDENCE OR IN THE GIVING OF INSTRUCTIONS; AND THE APPELLANTS WERE NOT PREJUDICED IN THE CONDUCT OF THE TRIAL IN ANY MANNER AS TO AUTHORIZE REVERSAL ON THIS APPEAL.

Under heading "C", Pages 46 to 50 of Appellants' Brief, complaint is made of failure of Appellees to call certain witnesses whose testimony Appellants apparently feel

would have been helpful to Appellants. The argument is made that these witnesses, since they were not called by the Appellees, necessarily would have given testimony adverse to the Appellees and that, therefore, the Appellants are entitled to some sort of a presumption. The fact is, of course, that these witnesses were equally available to Appellants. Appellants knew the trial dates and had every opportunity, if they desired, to obtain the testimony of these witnesses. In fact, Appellants introduced Exhibit 17 which was an analysis made by Dr. Greenwood, one of the witnesses whom Appellants insisted should have been called by Appellees.

At the conclusion of the trial, Appellants made no request to the Trial Court for an instruction related to any such presumption, and made no objections as to this point with regard to any instructions actually given by the Court. The record as to the objections made to the instructions appears at page 1125 of the record.

It is elementary that to justify a reversal on appeal the Appellants must show in what manner they were prejudiced by any claimed errors. No attempt is made to show as to this particular matter that prejudicial error was committed. The Appellants lay no foundation which would justify this objection. The circumstances concerning the availability of Dr. Greenwood and Dr. Ziegler, who were not residents of Idaho and who were not subject to subponea in Idaho, was not caused to be placed in the record by the Appellants. The situation with respect to Dr. Leonard is not shown by the record. His physical condition, the basis upon which he may

have made certain tests, the validity, and his ability to take those tests are matters which Appellants had a duty to make apparent in the record if they are to rely on any such objection as now made. The record as to the complaint now made by Appellants with respect to Dr. Leonard appears at pages 987 to 991. No suppression of evidence exists. If the Appellants intended to offer Exhibit 35, they had the duty to see that Dr. Leonard was there to explain the exhibit. This they did not do and any inference is against Appellants for their failure in this regard.

We most respectfully urge that this portion of Appellants' argument is without any substance or merit whatsoever. Likewise, the same may be said of Appellants' criticism with respect to Dr. Greenwood and Dr. Ziegler, as well as Dr. Wiese. If there is any matter which the Appellants believed should have been brought to the attention of the Court and jury through any of these persons, they had every opportunity to call them and it was incumbent upon Appellants to do so.

Under Section "D" of Appellants' Brief, pages 50 to 55, it is urged that the Court committed reversible error in not instructing that a reasonable amount for the salaries of Appellees should be deducted from net profits in assessing damages. The fact is that the Appellees had the expense connected with the operation of the hatchery and did not take any salaries at all. Consequently, no deduciton could properly be taken under the facts as established. The Meaders did work and were required in fact, to work more than would have been necessary had not the damage or losses been caused by

the Appellants. The cases cited by them are those where performance under a contract is rendered impossible and, as a consequence, no work has been done by the claimant, but he, nevertheless, includes in his claim for damages a reasonable amount for salaries. In such event, the cases hold that a reasonable salary deduction is proper. Here the Meaders took no money from the operation of the business as salaries or wages. These people had no income except from net profit of the hatchery and had no other employment and nothing was charged to expense of the hatchery for their services. R. 775-777, 796.

Specifications of error VI, VII, and VIII have to do with instructions requested but not given. These specifications are apparently covered in the Brief of Appellants under heading "E", pages 53-55, heading "F", pages 55-56, "G", pages 56-75, and "H", pages 75-77.

Requested instruction 8 is set forth at page 16 of Appellant's Brief. The instructions as actually given by the Court are contained at pages 1110-1125 of the record. At pages 1116 and 1117 the Court instructed the jury in accordance with the provisions of Section 52-101 of the Idaho Code, defining a nuisance. The Court also instructed as to the reasonablness of the use of Appellants' property and as to whether or not the use was such as to be reasonable as to the Plaintiffs. A perusal of all of the instructions as given by the Court shows that the jury was instructed properly as to the law and that the Appellants were in no manner prejudiced by the instructions. No case is cited which supports such an

instruction as contained in Appellants' requested instruction No. 8, when the instructions actually given by the Court are considered as a whole.

Appellants' requested instruction No. 31 is set forth under Specification of Error VII, pages 16-17 of their Brief. The requested instruction was a so-called pinpoint instruction, attempting to emphasize specific portions of the evidence. The Court did instruct the jury, R. 1118, as to the burden of proof upon the Appellees. The Court stated:

> "Plaintiffs must prove that some act or activity on the part of the Defendants, or either of them, caused damage to the Plaintiffs' fish and fish eggs. Proof in this connection must establish causal connection between the acts or activity of Defendants and the damage to the Plaintiffs beyond the point of conjecture or surmise. It must show more than a possibility of damages from the Defendants' acts or conduct."

The Court then went on to advise the jury that in considering causal connection they could consider all the facts and circumstances found to have been proven by the evidence; and that the fact that fish died and there was an egg loss in and of itself would not establish liability, but that by a preponderance of evidence the jury must find that dangerous and toxic substances from the plants of Defendants, one or both, settled in, upon, or were carried into contact with fish and fish eggs in the Plaintiffs' hatchery in a sufficient amount to

harm fish and fish eggs. These, and the other instructions given, certainly covered the applicable law and in no manner prejudiced Appellants.

Appellants at pages 55 and 56 of their Brief make some reference to Appellees contending that a presumption existed in their favor. A perusal of the instructions of the Court will not disclose the giving of any instructions as to presumptions and at no time have the Appllees, throughout this litigation, argued as to any presumption, except as shown by the evidence from all of the facts and circumstances introduced in evidence. Appellants in these pages of their brief make the flat statement that Dr. Wohlers and Dr. Wood disproved Appellees' claim of fluoride damage, and, thus, the burden was on the Plaintiffs to contradict the proof of Dr. Wohlers and Dr. Wood. Appellants also make certain other statements as to what their evidence showed, which they apparently felt overcame any evidence introduced by the Appellees. At most, there was only a conflict and the jury resolved that conflict in favor of the Appelles and against the Appellants.

Appellants' witnesses never explained their own analysis of Meader trout as compared to trout outside the contamination area, where the Meader trout showed in the viscera and tissues 14 to 77 ppm. fluorine and the other trout showed but 2 ppm. fluorine in the viscera and tissue. Also, Dr. Wohlers in considering the problem of the leaves in September 1954 admitted under cross-examination that the samples of the leaves were never tested in the unwashed state. R. 1038. Likewise, Dr. Wohlers, again under cross-examination,

admitted that as to sample point No. 25, shown on page 20 of Exhibit 4, which was a sample of vegetation taken from the Martin place, which is near the Meader properties but actually a greater distance north from the manufacturing plants of Appellants, showed 300 ppm. in the unwashed state, but when analyzed in the washed state analyzed only 108 ppm. R. 1034-1036. Dr. Wohlers admitted that the washings represented soluble fluorides and the washed sample contained the fluorine material still inside the leaf. The washings would be the fluorides on the external part of the leaf. In other words, 192 ppm. of fluorides were soluble and were on the leaf in the unwashed state which do not reflect in values used by the appellants. These fluorides were in no manner considered by Dr. Wohlers in any of his calculations or conclusions. R 1037-1039. Furthermore, Dr. Wohlers is not a meteorologist, personally knew nothing about the winds except by reason of studies he had made for him. R. 1040. It is also of some importance in evaluating Dr. Wohlers' testimony that he was never present during the winter months, that he did not even come to Pocatello and become in any manner associated with the problem until the spring of 1954, that he then did not stay, that he never was at the Meader Hatchery during the hatch of eggs, and that he only took 36 samples of water, most of which were taken in 1955, 1956, and subsequent years. The record is absolutely clear that the heaviest concentration of the fluorine emissions from the plants of the Appellants were in the years 1953 and 1954. In taking the tests, no importance at all was attached to taking the tests at the times when heavy fumes and smoke from

Appellants' plants were settling over the ponds and realty of the Meaders; nor was any importance attached to the phenomena of inversion, existent during the winter months when the air is heavy and holds all fumes and smoke close to the surface of the ground for protracted periods.

Contrary to the flat statement of Appellants that the shale was not changed in the manufacturing process, is the testimony of their witness, Kass, and Dr. Wohlers. Kass testified that hydrogen fluoride and silica tetra fluoride are emitted from the shale during the manufacturing process. R. 189. Hydrogen fluoride is very toxic. R. 261, 1028. In 1950 Food Machinery in one of its own company reports, made by Kass, himself, stated: "The fluorine contamination in the area surrounding the Westvaco Plant is very serious". R 200-202. Hydrogen fluoride and silica tetra fluoride are soluble in water and very reactive to water. R. 239, 294-295. Dr. Gale testified that because of its toxicity hydrogen fluoride is difficult to work with. R. 261. Of course, the importance of all of this is that Appellants are attempting to convince this Court that the emissions from the plants were not soluble and, consequently the fluoride ion could not damage the trout in the ponds of Meaders. Dr. Gale also stated that a fish would swallow water every time it opened its mouth and the fluorine would go into its stomach and that fluorine would also go in through the gills. R. 296. Even the insoluble fluoride ions from the fluorapitite particle would be acted upon by hydrochloric acid or any other digestive enzyme and would free fluorine. R. 303-306. Dr. Gale testified directly that small amounts of fluorine would produce effects not normal, such

as limiting its fertility. This applies to fish as well as all animal life. This would not according to Dr. Gale be visible by the typical knife or microscope method of analysis. R. 303.

Under the portion of the Brief designated "G", Appellants consider the testimony of Dr. Gale as against the testimony of Dr. Wohlers and Dr. Wood. That discussion amounts to nothing more than argument as to the appellants' analysis of all of the facts and circumstances of the case as presented to the jury and which argument was rejected by the jury. The entire argument is predicated upon the validity of opinions advanced by Dr. Wohlers and opinions advanced by Dr. Wood and by disregarding any evidence against the Appellants contrary to the position which they claim the evidence shows.

In this portion of their Brief, Appellants insist that there is a complete lack of testimony to show connection between flourine content of vegetation samples and that of the water samples. In this we can in no manner agree with Appellants. The effluents from the manufacturing plants of the Appellants were carried on the surface of the water to the same extent as they were carried over the surface of the land, and were deposited upon the surface of the water in precisely the same manner as they would be deposited upon vegetation and real estate. The fish were in the water and were exposed to and stored the fluorine in their bodies over a long period of time as did vegetation. Appellants' own exhibits showed fluorine content of the Meader water of 4.7 ppm. The Appellants attempted to prevent a disclosure of this testing. Examination of Food Machinery & Chemical Corporation's answer to interrogatory No. 10, appearing at pages 32 and 33 of the

record, shows that they at that time claimed there were no individual results available of water testing on the Meader properties for the year 1953. However, Exhibit 5 is one of the exhibits which Appellants produced in Court and which was admitted in evidence by the Court after strenuous objection by Appellants. Table 9 as contained in that exhibit shows various testing of the Meader ponds as made by the Appellant, Food Machinery & Chemical Corporation, during the year 1953. Among those testings, was testing of Spring No. 1, referred to in the table as 10-A, showing a range in 1953 of .5 to 4.7 ppm. in running water. When Mr. Kass was asked whether or not he had the breakdown as to those individual tests, he testified they could not be located. However, in the answer to the interrogatory as referred to no mention whatsoever was made of the 4.7 ppm., but in fact the answer was given as an average. No breakdown was given as to the particular fluorides shown on these testings, but it is significant that the testings also showed the P205 content of these springs, and that content in spring 10-D was up to 7 ppm. P205 is phosphorus pentoxide and is a product emitted both by the Simplot plant and by the Food Machinery plant. Phosphorus pentoxide is highly caustic and reacts violently with water to evolve heat. The phosphate was the material processed by both of the plants of Appellants and there was no other possible source for the fluorides or for the phosphorus pertoxide than the plants of the Appellants. The testimony of Mr. Kass, an adverse witness to Appellees matter, appears in the record at pages 243-247.

Appellants have taken portions of Dr. Gale's testimony

without relation to other portions of his testimony and insist that Dr. Gale's testimony was in no way applicable to the Meader trout and the Meader eggs. In so doing, Appellants overlooked much of Dr. Gale's testimony, the full purport of which cannot be obtained without reading all of his testimony as it appears in the record. Actually, Dr. Gale in the course of his testimony stated that as to mature trout any amounts of flourine in excess of 3 ppm. in reaching the cells was going to have a damaging effect and in the case of less than mature trout, less than 3 ppm. would have its affect. The fish has as a storehouse mechanism, bones, which can store fluorine up to certain amounts as testified to by Dr. Gale and these amounts may be accumulated over a long period of time from exposure to less than a constant level of 3 ppm. Consequently, any amount in the Meader waters in excess of the amount which the fish could properly store and eliminate was going to and did reach the tissues.

Dr. Gale testified positively that any living thing or life taking over 3 ppm. through their kidneys will get into some difficulty in their cellular structure and that such was well above the normal environment tolerance. R. 277.

The evidence is absolutely undisputed that the Meader trout did have in the viscera and tissues 14 to 77 ppm. fluorine. This, when coupled with the direct and positive testimony of Dr. Gale, leaves little room for doubt as to the cause and the effect of the fluorine emissions from the Appellants' plants upon the Meader trout and eggs. Appellants' witnesses at no time explained why trout outside the industrial area had

only 2 ppm. fluoride in viscera as compared to 14-77 ppm. fluorine in Meader trout. This conclusively shows excessive amounts of fluorine were reaching cells of the Meader trout.

At pages 313 to 319 of the record, Dr. Gale, under cross-examination, discussed the ability of trout to detoxify excess amounts of fluorine. Upon being asked whether or not an adult trout could detoxify an excess amount of fluorine, Dr. Gale said that if the fish could escape the environment or get into another section of water where no fluorine existed, the cells that had been destroyed by the excess fluorine would be replaced, but there would be an affect, because fluorine is such a poisonous compound. R. 314. Dr. Gale also testified that if the older trout has not already built up a high concentration from living in the environment in the area, if he had not filled his toxicity storehouse, he would be able to detoxify more fluorine than a young fish over a period of time. Nevertheless, the trout would be affected and his metabolism would be different than originally created. The trout can only properly handle 3 ppm. of fluorine and any excess, anything retained, would cause chemical combinations with enzymes and would inhibit some of them. R. 316. Dr. Gale repeatedly stated that fluorine is one of the most toxic substances known and it affects everything.

At pages 310 and immediately following of the record, Dr. Gale discusses the effect of the fluorine ion upon trout eggs. In this regard, Dr. Gale stated that the fluorine ion is such a small molecule that it can go through the placenta of the trout and harm the eggs.

At page 293 of Dr. Gale's testimony, it is made clear that Dr. Gale actually testified that small amounts of fluorine ingested could and would build up a concentration in an amount which would be harmful to the cellular life of the trout. The following appears on that page of the transcript:

"Q. When you are talking about 3 parts per million as compared to cells, you are talking about the percentage reaching the cells?

A. Yes.

Q. You are not talking about the parts per million in the alfalfa that the cow consumes, is that correct, when you are talking of the 3 parts per million?

A. Of the total food.

Q. The effect you are talking about when you gave the testimony as to the effect on the enzyme system, what is that based upon, that number of parts per million reaching the cells?

A. Yes, sir.

Q. That is not the amount of the parts per million of what is taken in?

A. Yes sir.

Q. It is what reaches the cells?

A. Yes, sir. If you kept it up you would get that concentration.

Q. Over a period of time?

A. Yes sir.

Q. Insofar as your knowledge of fish and this area, and as to the Meader water and the Meader fish, what is the fact as to whether any of that knowledge has any effect in your opinion and your statements of your study of fluoride on cell life?

A. I wouldn't change my mind. That is a big question. All of the texts of biochemistry gives the figures. We have had the work in the field for years, I can't change my mind on that.

Q. Doctor, you were asked whether you know any of the emanations from the Westvaco Plant and the Simplot Plant, and you said you didn't.

A. To be fair, I live in Pocatello, and all I know is the things you naturally hear or smell.

Q. And what you see?

A. Yes.

Q. Are you acquainted with hydrogen fluoride?

A. Yes.

Q. And silicon tetra fluoride?

A. No sir. I have an idea of what it is from the name.

Q. Now, as to the toxic effect on cell life, what do you have to say as to whether all of the fluoride family, if it reaches the cells, would have an effect on the cell life?

A. That is the enzyme system. It would all have an effect unless it reaches there in a insoluble form. The fluoride has the ability to unite with something—I can think of one product—if you could produce freone, a gas that is light, it would go up, you might not be able to get the true fluorine effect from freone, all of the elements are present. If it's available to the body, it will block the body processes.

Q. Regardless of the type?

A. If it is soluble at all, from fluorides emitted between the molecules and for a moment it is available to anything that it can be stuck to, and if an enzyme is there, it will stick to you.

Q. You testified that you are familiar with the hydrogen fluoride in a gaseous state.

A. Fluoride and hydrogen fluoride are gases.

Q. Now, when you talk about reacting in such manner, do they mix with dust particles in the air?

A. Would you restate that?

Q. Hydrogen fluoride is a gas.

A. That's right.

Q. Does that gas have a reaction with any known substance?

A. It is very reactive, yes, sir. It will react with other elements in the water.

Q. And it is reactive to water?

A. Yes, sir.

Q. Is it soluble in water?

A. Yes, sir.

Q. Would hydrogen fluoride have the effect on the enzyme system as you have discussed it here?

A. Yes, sir.

Mr. Racine: That is all."

Appellants attach significance to tests of water taken in the fall of 1955 by Utah State College and other tests of water taken by the University of Idaho, commencing in June of 1955. It is important to note that these tests were taken in the years following the heaviest emissions from Appellants'

plants. No showing was made that any tests were taken at times when the fumes and emissions were settling on the Meader property. In the spring of 1955 the Appellants state that they had reduced the emissions from some 6500 lb. per 24-hour period emitted from the Food Machinery Plant to 600 lbs. and 484 lbs. emitted from the Simplot plant per 24-hour period to 190 lbs.

Actually the record shows that the Appellants were only estimating as to 1953 and even 1954 and had no accurate measurements. Simplot had no true records from which they determined the matter at all. R. 400-436. Ex. 12, R. 432-434. Simplot at times was actually releasing as much as 2137 lbs. of gaseous fluorides per day in 1953. R. 433. This, coupled with Food Machinery's estimate, considerably increases the pounds emitted by the plants above the figures used in the calculations of Appellants appearing at pages 67 and 68 of their Brief.

The argument contained on those pages also completely overlooks the unwashed fluorides on the vegetation and overlooks the fact that the fish were in the water and could not leave the water and would ingest and store fluorides in their bodies. Plant life in this vicinity contained fluorides up to 300 ppm., clearly showing, regardless of any assertions made by Appellants, that the contamination from the plants was deposited on the properties in amounts far exceeding those which Appellants attempt to illustrate by their various formula.

The formula used by Appellants at pages 67 and 68 of

their Brief do not accurately consider wind. The facts as to the wind directions, prevailing winds and inversion are contained in Exhibit 41 and the testimony of the United States Weather Bureau meteorologist. R. 1099-1107. Exhibit 41 contains the information as to winds for each hour during the years 1953 through 1956. The meteorologist explained that prevailing wind does not mean that the wind is not blowing from any other direction, but only that it blew more hours that day from the direction which is designated as the prevailing wind. In the calculations of Appellants, only prevailing winds were used and no effect was given to calm days or other winds blowing a given number of hours from other directions, which would carry the effluents to the Meader properties from the manufacturing plants of Appellants. Also, no regard was given to the so-called "valley wind" flowing down the Portneuf River upon which the Meader Hatchery was located. The metorologist stated that wind is never a constant, steadying force from one direction, but is a free gas that is flowing and eddying. The meteorologist stated that he was familiar with inversion, knew it existed in the area of the Meader Trout Farm and that he had seen smoke and smog that the inversion phenomena did affect on the Meader Trout properties. Inversion would hold smoke and smog below the inversion height and cause it to remain in one area without dissipating. R. 1106-1107.

Dr. Wood stated positively that fish can be poisoned by fluorine and can have fluorosis. R. 1058. He stated that the symptoms of fluorosis in fish are lethargy, loss of appetite, rapid and convulsive twitching movement, followed by death.

R. 1058. All of these are consistent with effects in the Meader fish. Dr. Wood also agreed that chronic floride poisoning can be caused by small quantities of fluoride which produce no apparent effects when administered singly, but may lead to marked changes when their ingestion is continued. These present different phenomena according to the intensity and duration of exposure when the water supply contains excessive quantities of fluoride, to extensive bone changes and functional disturbances in heavy industrial exposure. R. 1090-1091. It is also absolutely clear that Dr. Wood has made no study of air pollution, had no knowledge as to how far the emissions from the Appellants' manufacturing operations would travel, had no knowledge as to the particles of gaseous matter in quantity that come out of the Appellants' plants, and had no knowledge as to the manner in which those particles of gaseous forms would be distributed. R. 1065-1066.

Appellants make a point of the profits from the hatchery operation in 1955 and from that argue that there wasn't anything wrong with the hatchery after all, and that they had raised a great number of fish and had simply been accumulating them over the years. They also apparently argue that the hatchery just wasn't managed and operated properly. Of course, this argument as to mismanagement is completely contrary to all of the facts and rests entirely upon the opinion of Dr. Wood. All other witnesses testified that the management was sound and that there was no disease and no other difficulty with the fish excepting that which would be caused by the fluorides.

The matter of the profit in 1955 was fully explained.

The eggs could not be sold and the Meaders attempted to hatch such eggs as they could and accumulated such fish as they could. The egg hatch in 1955 was better than it had been in the previous years. This was perfectly consistent with the reduced emissions from the Appellant's plants in that year. R. 785. The evidence shows without dispute that the Meader operation was primarily an egg station with eggs being sold to a market all over the world, developed through many years, and this was the primary source of income. To make the income in 1955, the entire operation was changed. No eggs were sold in 1953 or in 1954 and the hatchery operated at a loss, with all of the expenses continuing. An attempt was made to hatch such eggs as could be hatched and to raise such fish as could be raised in the years 1953 and 1954, and in 1955. Then, in 1955, accumulated fish were sold, not eggs.

This argument of the Appellants is as the other arguments advanced, one in which there might be a difference of opinion, but one which would not require the jury to find as urged by the Appellants. Substantial evidence existed upon which the jury disregarded the argument as now advanced by Appellants.

Even though Appellants reduced the amounts of fluorine emissions from the plants in 1955 and 1956 which may have resulted in lesser amounts of fluorine being deposited in the waters, nevertheless, the heavy emissions of fluorines during the previous years had unbeknown to Meaders already taken their toll. The spawner trout had exceeded their fluorine toxicity storehouse so that their enzyme processes had been affected, resulting in infertile and inferior eggs and abnormalities in a large number of fish which were hatched. This

manifested itself in 1955 and 1956, even though emissions from Appellants' plants had been reduced. This result is completely supported by Dr. Gale's testimony.

We do not argue that Appellants are not entitled to believe what they desire from the evidence which they prefer to give most weight. However, we do strenuously and respectfully assert that the record fully justified the Trial Court in overruling the Motion for Non-Suit, Motion for Direct Verdict, and Motion for Judgement Notwithstanding the Verdict, as made by Appellants. Likewise, the evidence is substantial and fully justified the jury in its verdict.

At pages 75 to 77 of their Brief, Appellants attempt to develop argument and authorities which would show prejudical error in the failure to give resquested instruction No. 2 assigned as error under specification VIII. A comparison of that requested instruction with the instructions actually given by the Court shows that the requested instruction was covered and that the requested instruction in itself did not state all of the applicable law as actually given to the jury in the courts instructions. The cases cited by Appellants, the *McNichols* case, 74 Ida. 321, 262 P. 2d 1012, and the *Koseris* case, Ida. 352 P. 2d 235 in no manner support the contention that the Appellants did not maintain a private nuisance as to the trout and trout eggs of the Appellees. *Amphtheatres, Inc. v. Portland Metals,* 198 P. 2d 847, cited under this proposition at page 27 of Appellants' Brief, was an action for an injunction against a race track from casting a light on an outdoor movie screen. The light was about the same as provided by a full moon. The

Court in that case simply said that the existence or non-existence of a private nuisance is generally a question for the jury but because the alleged nuisance was nothing more than that which a full moon would provide, obviously no nuisance existed. The other cases were likewise different on their facts and generally an injunction was asked. Here, no injunction was involved. The action of the Appellees was one for damages. The *Koseris* case, Idaho, 352 P. 2d 235, involved the comparative injury doctrine and since the action was one for injunction and not for damages the Idaho Court merely refused to grant an injunction, but certainly did not hold that the actions on the part of the Defendant in that case were not a nuisance and that the Plaintiffs were not entitled to damages.

The parties furnished the Trial Court trial briefs covering all of the requested instructions and covering what was felt to be the law applicable to the case under the theory each of the parties advanced. All of this was carefully considered by the Court during the trial and prior to the giving of instructions to the jury.

From the facts and circumstances of this case and the instructions as given by the Trial Court relating to nuisance, we believe that the Court undoubtedly would have been in error in refusing to submit the question of nuisance to the jury. It was for the jury to determine whether or not the activities of the appellants as they affected the appellees were in fact a nuisance and did in fact damage the Appellees.

The following cases establish the law of nuisance as applied to the facts and circumstances shown by the evidence:

Permanente Metals Corp. v. Pista, et al; CCA 9, 154 F.2d 568, page 570, where the court said:

"Aside from the evidence on the subject already mentioned, substantial support for the award is to be found in a comparison made by an admittedly qualified witness between the crop produced on appellees' orchard and that produced in a nearby orchard lying outside the dust zone, but otherwise similarly circumstanced in all material respects and subject to the same natural causes and elements. In the case of the latter orchard, unaffected by the dust, the crop was shown to be about 60 per cent of normal whereas the yield on appellees' orchard was not more than 10 per cent of normal. It was upon this comparison that the trial court appears most heavily to have relied."

McNichols v. Simplot, 74 Ida. 321, 218 Pac. 2d 695; *Mullen v. Jennings,* 141 Kan. 421, 41 Pac. 2d 753; *Morgan v. Tigh Ten Oil Co.,* 77 SE 2d 683, 238 NC 185 (1953); *Sam Finley, Inc., v. Russell,* 42 SE 2d 452, (1947); *United Verde Copper Co. v. Jordan, et al.* 14 Fed. 2d 299; *Kelley v. National Lead Co.,* 210 SW 2d 728, (1948); *Volata v. Berthelet Fuel & Supply Co.* 36 NW 2d 97.

The Legislature of the State of Idaho has seen fit to provide for actions for nuisance, *Idaho Code, Section 52-111,*

and define it in a separate section:

> *Idaho Code, Section 52-101*—NUISANCE DEFINED.
>
> "Anything which is injurious to health or morals, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street or highway, is a nuisance."

At pages 77 to 81 of Appellants' Brief, it is urged that the Trial Court committed reversible error in connection with Appellees' Exhibit 1 to 9. No authorities whatever are cited by Appellants. The Exhibit 1 was a report directly involving the witness, Kass, and he was interrogated as to his personal knowledge regarding that report prior to the report being in evidence. The objection was made by Appellants but the Court ruled that although the exhibit was not yet in evidence any part of the exhibit that Kass made as a report he could certainly testify regarding, as he knew whether or not he made those statements. R. 200-202.

The entire matter of the admission of Exhibits 1 to 9 was the subject of numerous conferences with the Court. Appellees' position was and is that those reports were made by Food Machinery in the regular course of business, constituted complete reports directly relating to the fluorine problem in the area in which the Meader properties are included and were relevant and material, and to the extent that any admis-

sions against interest were contained in those reports Appellees were entitled to the benefit of such admissions.

Appellants made general objections to the exhibits, including that the exhibits were prejudicial. Appelllees offered to delete any prejudical contents and deletions were made as to the items that were specifically mentioned by Appellants. This entire matter appears in the record, particularly at pages 906-908, 913-916. Appellants, pages 78 and 79 of their Brief, state that they offered to stipulate the materials from Appellees' Exhibits 1 to 9. No Stipulation was ever presented, nor was any summary ever offered. The Appellants make the flat statement that the exhibits were prejudical to them, but they in no respect point out the prejudice.

22 Am. Jur. Section 1049, page 888, states the rule applicable to these Exhibits, as follows:

> "The rule is well settled that for certain purposes reports made by an agent or employee to his employer, if such report is required of the employe or is made in the line of his duty, are admissible in evidence to prove a fact at issue. It has been held in some cases that such reports are competent both to affect the employer with notice of, and to establish as against him, relevant facts and existing conditions leading up to the cause of action * * *."

Appellants also insist that the Court committed reversible error in admitting Appellees' Exhibit 22. No Authorities are cited for this position. Exhibit 22 was an analysis of the

fish losses as prepared by Appellees' accountant from memorandums and records furnished by the Meaders. The accountant testified directly that the exhibit clearly reflected the information furnished him. The Exhibit was prepared in 1955. Objection was made by counsel for Appellants to the Exhibit. R. 667. The Court at that time reserved ruling on the exhibit. R. 668. Thereafter, Allen Gates, testified directly that he, while employed by the Meaders during the years involved in the law suit, made records concerning the loss of trout eggs and trout. R. 675-678. Mr. Gates stated that he compiled the information from which exhibit 22 was made by the accountant. R. 677. Under cross-examination, Mr. Gates testified as to how he compiled the information and how the information was delivered to the accountant each month. This cross-examination and the redirect examination concerning it is contained in the record, pages 678-708. The exhibit was finally admitted in evidence. R. 858-859. The court admitted the exhibit under the best evidnce rule, no fraud having been shown, and the persons who compiled the information having appeared and testified. Mr. Phil Meader testified that the information from which the exhibit was compiled had been compiled at his direction over the months and years by all of the men at the hatchery reporting the amount of dead fish in notes which the bookkeeper, Mr. Allen Gates, made a record of before they were taken to the accountant for the compilation which resulted in Exhibit 22. R. 606-609. The Appellants have demonstrated no prejudicial error regarding this exhibit.

The Rule is well settled that where original records have

been destroyed innocently or as a part of routine practice of the one keeping the records, a summary of such record made from the original record is admissible under the best evidence rules and the law permits the introduction of such evidence even though the original records are not available.

> *Edmunds v. Jellef*, 127 Atl. 2d 152; *Reynolds v. Denver & Rio Grande Western Railroad Co.*, 174 Fed. 2d 673 (10 CCA); 4 *Wigmore on Evidence*, 437, Seciton 1230 (3rd Edition, 1940); *4 Wigmore on Evidence*, 354, Section 1198 (3rd Edition, 1940); *5 Wigmore on Evidence*, 393, Section 1532 (3rd Edition, 1940); *4 Wigmore on Evidence*, 352, Section 1198, (3rd Edition, 1940); *Roddy v. State*, 64 Ida. 137, 139 P2d 1005; *20 Am. Jur. on Evidence*, 391, Section 438.

Appellants also urge that the refusal to admit Appellants Exhibit 35 was prejudicial error. This Exhibit involved the admission of certain water tests taken by Dr. Leonard. This matter has been disscussed in this Brief with respect to Section "C" of Appellants' Brief. It is clear that Dr. Leonard was not called by the Appellants and no foundation whatsoever was made by Appellants regarding the admission of this exhibit. Appellants cited no authorities as would support their contention that this exhibit was admissible or that they were prejudiced by it not having been admitted. The offered exhibit in itself did not show the times that any

such tests were taken, nor any of the circumstances surrounding such tests. Appellants had the opportunity to lay the foundation and they did not attempt to call Dr. Leonard, nor show that he was not available as a witness.

Finally, Appellants claim prejudicial error justifying reversal as to the refusal of the Trial Court to admit Appellants' offered Exhibit 20. This involved a letter, the contents of which had nothing to do with the law suit and the only purpose was to impeach the testimony of Phil Meader. Phil Meader testified that he did not remember giving Dr. Wohlers such a letter. Dr. Wohlers testified that either the original or a copy of such letter had been delivered to him by Phil Meader. Under these circumstances, the copy which was offered as Exhibit 20 could have no purpose whatsoever other than to introduce irrelevant matter. No basis for impeachment existed. The testimony of Mr. Phil Meader as to this Exhibit appears at pages 619-620 of the record. The testimony of Dr. Wohlers appears at pages 1014-1018. The ruling of the Court appears at pages 1018-1019.

We believe that the errors as to admission of evidence and instructions asserted by Appellants are wholly without merit and that no authorities are cited by them to establish otherwise, nor is any showing made that Appellants were legally prejudiced in such a manner as to justify reversal.

CONCLUSION

Appellees respectfully assert that the record shows sub-

stantial evidence entitling the jury to weigh and consider all of the facts and circumstances as shown. It is not the function of an Appellate Court to say that the evidence points more favorably to certain results than to other results, if in fact there is evidence shown upon which either result could be concluded by the trier of facts. For an Appellate Court to weigh the evidence is to usurp the function of the jury and take from the jury its right to consider and make its determination from all of the evidence and the inferences and intendments flowing from the evidence. The Supreme Court of the United States in *Sentilles,* 4 L. Ed. 2d 142, precisely states this view.

The judgment should be affirmed in all respects.

Respectfully submitted,

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Attorneys for Appellees.

I hereby certify that copies of the above and foregoing Brief were served upon counsel for each of the Appellants in accordance with the Rules of this Court on the 6th day of February, 1961.

LOUIS F. RACINE, JR.

of Counsel for Appellees